# Equity For Punks

**Equity For Punks: Conceptual issues with public protections in offerings of shares to the public**

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## 1. Introduction

On 9 September 2020, popular drinks manufacturer BrewDog plc[1] published a prospectus[2] to offer shares to the public, known as BrewDog's "Equity for Punks Tomorrow". This scheme is a retail offering allowing individuals to subscribe for "B shares" in the capital of BrewDog plc.[3] This is the sixth time that BrewDog have offered such shares for the public, following previously successful "Equity for Punks" raises.[4] The offer is to subscribe for shares in BrewDog. Shares are normally said

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[1] BrewDog plc is a Scottish company (with registered number SC511560). General received wisdom is that the substance of Scots company law overlaps with English company law – N Grier, *Company Law*, 5th edn (W Green, 2020) at para 1-29.

[2] Available at https://downloads.ctfassets.net/b0qgo9rl751g/ETxSoJgJiHcEWDU1bMipw/54212768f0386338974e502a99abc384/13104_-_EFP_Prospectus__Summary_and_Registration_Document__Spreads_.pdf.

[3] Ibid, Securities Note p 3.

[4] https://www.brewdog.com/uk/community/culture/our-history.

to have three key entitlements[5]: the right to a dividend,[6] the right to vote,[7] and the right to a residual claim on the company's surplus.[8] In exchange for these entitlements, shareholders are paid out last in the corporate waterfall,[9] and there are restrictions about when shareholders can withdraw their funds.[10]

For private companies, these entitlements are frequently varied,[11] and so it is not unusual to see shares in private companies with no dividend rights, no voting rights, and/or no rights to a residual claim. In addition, it is usual in private companies to restrict the free transfer of shares.[12] We explore the extent to which the BrewDog shares offered to the public contain these rights and other features. We argue that the entitlements attached to the shares on offer are lower than they would be if the offer to the

[5] See PL Davies and S Worthington, *Gower Principles of Modern Company Law,* (Sweet & Maxwell, 10th ed, 2016), para 23-4, G Morse et al, *Palmer's Company Law* (Sweet & Maxwell, Release 168, 2020) para 6-009. See also discussion in MJ Whincop, 'Painting the Corporate Cathedral: The Protection of Entitlements in Corporate Law' (1999) 19 Oxford Journal of Legal Studies 19 applies this concept to interactions between the directors and the company. S. Worthington, 'Shares and Shareholders: Property, Power and Entitlement (Part I)' (2001) 22 The Company Lawyer 258; S Worthington, 'Shares and Shareholders: Property, Power and Entitlement (Part II)' (2001) 22 The Company Lawyer 307.

[6] For the economic case, see DJH Greenwood, 'The Dividend Puzzle: Are Shares Entitled to the Residual?' (2006) 32 Journal of Corporation Law 103.

[7] For a theoretical discussion, see H.G. Manne, 'Some Theoretical Aspects of Shareholder Voting: An Essay in Honor of Adolfe A Berle' (1964) 64 Columbia Law Review 1427.

[8] The normative case for other features are often predicated upon this feature – e.g. FH Easterbrook and DR Fischel, 'Voting in Corporate Law' (1983) 26 Journal of Law and Economics 395.

[9] Insolvency Act 1986, s107.

[10] E.g. restrictions on dividends in Companies Act 2006, s831, and restrictions on redeeming shares in Companies Act 2006 s658.

[11] MA. Pickering, 'The Problem of the Preference Share' (1968) 26 Modern Law Review 499; WW Bratton and ML Wachter, 'A Theory of Preferred Stock' (2013) University of Pennsylvania Law Review 1815.

[12] E.g. *In Re Cawley & Co* (1889) 42 Ch. D. 209; *Charles Forte Investments Ltd v Amanda* [1964] Ch. 240.

public was coupled with a public listing on the London Stock Exchange. Accordingly, we argue that we need to re-balance protections provided across company law and capital markets law.

This article proceeds as follows. Part 2 reviews the difference between an offer to the public and a public listing of shares. Part 3 explores the terms of BrewDog's offer. Part 4 looks at other equity raises which have relied so heavily on branding features. Part 5 concludes.

## 2. Offers to Public

When a company raises external equity finance, as BrewDog are, they face additional restrictions than if equity raising from connected parties. This is because additional policy implications apply – lawmakers try to protect both potential investees[13] and retain confidence and efficiency in the public market as a whole.[14] First, there are restrictions that apply when a company offers its shares to the public – a wide definition which includes communicating sufficient information about an offer to enable an investor to decide to purchase shares.[15] Private companies cannot offer shares to the public, and so the company must be (or in good faith be in the process of becoming) a public company prior to doing so.[16] Being a public company brings automatic protections for its shareholders compared to being a private company, including: directors can only approve situational conflicts of interest if the

[13] See L Gullifer and J Payne, *Corporate Finance Law: Principles and Policy* (Hart, 2020, 3rd edn), Ch 10.

[14] See N Moloney, 'Confidence and Competence: The Conundrum of EC Capital Markets Law' (2004) 4 Journal of Corporate Law Studies 1.

[15] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, reg 2(d). See discussion in L Enriques and TH Troger, 'Issuer choice in Europe' (2008) 67 Cambridge Law Journal 521.

[16] Companies Act 2006, s755(1). The Companies Act definition of an offer to the public is not quite identical to the EU Regulation definition (see Companies Act 2006, s756(1). Morse et al, n 5 above, para 8-53.

articles specifically allow it[17]; public accounts have to be filed within a shorter time period of the end of the financial period for public companies than private companies,[18] reducing the chance that investment decisions are made on older information[19]; the Takeover Code applies to public companies (whether or not their shares are listed),[20] triggering (amongst other things) mandatory bids if a 30 per cent shareholder threshold is exceeded[21]; public companies cannot make quasi-loans to directors[22]; and public companies must have annual general meetings.[23] As such, shareholders in public companies have higher protections than in private companies. These apply regardless of the entitlements enjoyed by specific shares. To make an offer to the public, the company must issue a prospectus[24] which must be approved by the FCA. Certain details must be included in this prospectus. The prospectus must contain sufficient detail to enable an investor to make an informed investment decision.[25] These include specific

[17] Whereas in modern private companies, directors can authorise any such conflict unless there is a prohibition in the articles – see Companies Act 2006, s175; J Hardman, 'The Companies Act 2006: It's Time to Complete the Transition' (2020) 41 The Company Lawyer 93.

[18] Companies Act 2006, s442.

[19] This may be a losing battle - SJ Grossman and J Stiglitz, 'On the Impossibility of Informationally Efficient Markets' (1980) 70 American Economic Review 393. It is also only of any use if there is an actual ability to exit – therefore is of limited use if shares are not, actually, listed on the public market.

[20] See Companies Act 2006, Part 28; G Morse 'Assessing the impact of the Takeover Panel's Code Committee – Code Reform Institutionalised?' [2003] Journal of Business Law 314.

[21] Takeover Code (available at https://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf?v=7Nov2019), D3 Rule 2.2.

[22] Companies Act 2006, s198.

[23] Companies Act 2006, s336.

[24] Gullifer and Payne, n 13 above, ch 10.5.

[25] Financial Services and Markets Act 2000, s87A.

risk factors,[26] the financial condition of the company,[27] senior management and their remuneration.[28] There is a requirement to outline historic dividend performance, and the company's dividend policy.[29] This provides ex ante clarity to potential investors as to what their financial entitlements are likely to be when taking up an offer to the public. Accordingly, merely offering your shares to the public does not provide any restraint on the general ability to adjust entitlements attaching to shares: they can still be as freely adjusted as in private companies.

Second, the majority of UK companies[30] who make offers to the public do so to be able to list their shares on the London Stock Exchange.[31] In the same way that not all UK companies are listed on the LSE, not all companies whose shares are listed on the LSE are UK companies.[32] There can be no restriction upon transfer of shares which are admitted to the main market of the LSE,[33] and the platform itself provides a market for the transfer of shares, and therefore a liquid exit for investors.[34]

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[26] Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004, Annex 1, Section 3.

[27] Ibid, Annex 1, Section 7.1

[28] Ibid, Annex 1, Sections 12 and 13.

[29] Ibid, Annex 1, Section 18.5; M Gutiérrez and M Sáez Lacave, 'Strong shareholders, weak outside investors' (2018) 18 Journal of Corporate Law Studies 277.

[30] Gullifer and Payne, n 13 above, ch 10.3.3.

[31] Financial Services and Markets Act 2000, s 285, and the FCA's recognised investment exchange register - https://register.fca.org.uk/s/search?predefined=RIE. Here, we assume that all listings are main market listings. The LSE also runs an alternative investment market, which has lower levels of regulation.

[32] I MacNeil and A Lau, 'International Corporate Regulation: Listing Rules and Overseas Companies' (2001) 50 International and Comparative Law Quarterly 787; BR Cheffins, 'The Undermining of UK Corporate Governance(?)' (2013) 33 Oxford Journal of Legal Studies 503.

[33] Listing Rules, rule 2.2.

[34] Listing Rules, rule 14.2.2.

The listing rules provide that all equity shares of those companies admitted to the premium list of the main market[35] must have equal rights to voting.[36] In addition, empirical evidence suggests that the public market provides a premium to voting rights – implying that even if capital market rules did not require shares to obtain voting rights, market pressure would provide shares with voting entitlements where listed on capital markets.[37] Given that the price of securities is set by the market,[38] there is considerable pressure to provide a dividend stream to shareholders.[39] A raft of further protections also apply to those companies whose shares are admitted to the LSE.[40]

For our purposes, admission to the main market of the LSE provides certain legal and market driven characteristics to an investment which may not automatically be present in any particular share

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[35] Listing Rules, rule 1.5.1G(4).

[36] Listing Rules, rule 7.2.1A.

[37] M Bigelli and E Croci, 'Am I right or am I right? Dividend privileges and the value of voting rights' (2011) ECGI Finance Working Paper 312/2011.

[38] They are initially set by bookbuilders who gauge what the market price is likely to be – see TJ Jenkinson and H Jones, 'Bids and Allocations in European IPO Bookbuilding' (2004) 59 Journal of Finance 2309. The price then normally rises after IPO – see K. Rock, 'Why New Issues are Underpriced' (1986) 15 Journal of Financial Economics 187.

[39] DR Fischel, 'The Law and Economics of Dividend Policy' (1981) 67 Virginia Law Review 699; HK Baker and R.Weigand, 'Corporate Dividend Policy Revisited' (2015) 41 Managerial Finance 126; V Brudney, 'Dividends, Discretion and Disclosure' (1980) 66 Virginia Law Review 85; F Black, 'The Dividend Puzzle' (1976) 2 Journal of Portfolio Management 5.

[40] In addition to the benefits outlined above, there are corporate governance protections afforded under the UK Corporate Governance Code, available at https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf, required under the listing rules (Listing Rules, rule 9.8.6) which, amongst other things, requires independent directors, which has the effect of lowering agency costs - M Gutierrez and M Saez, 'Deconstructing Independent Directors' (2013) 13 Journal of Corporate Law Studies 63; W-G Ringe, 'Independent Directors: After the Crisis' (2013) 14 European Business Organization Law Review 401; F Song and AV Thakor, 'Information Control, Career Concerns, and Corporate Governance' (2006) 61 Journal of Corporate Finance 1845.

in a private company: a vote, a dividend, and an ability to exit your investment on a liquid market at a price set by the capital market as a whole. Indeed, it has been argued that the mere fact that the share is said to be 'owned' by a shareholder arises due to pressure from capital markets.[41] As a result, a share only inherently enjoys these features if it is listed on the LSE main market. This is often implicit in the literature: statements about rights attaching to shares often rely on a public market, whether such statement is normative[42] or descriptive.[43] BrewDog's offer is one to the public, but without a corresponding listing. It therefore falls between the two usual extreme paradigms – it is neither an offer to corporate insiders (who are expected to be fully cognisant of all risks for their investment), or an offer to the public on the capital market (which contains full legal and market protections to potential investees).[44]

## 3. BrewDog's Offer

[41] IH Chiu, 'The Meaning of Share Ownership and the Governance Role of Shareholder Activism in the United Kingdom' (2008) 8 Richmond Journal of Global Law & Business 117, 120.

[42] E.g. RC Nolan, 'Shareholder Rights in Britain' (2006) 7 European Business Organization Law Review 549, 570; P Ireland, 'Company Law and the Myth of Shareholder Ownership' (1999) 62 Modern Law Review 32; MT Moore, 'Private Ordering and Public Policy: The Paradoxical Foundations of Corporate Contractarianism' (2014) 34 Oxford Journal of Legal Studies 693.

[43] E.g. Greenwood, n 6 above, 116-123; Bigelli and Croci, n 37 above; Chiu n 41 above, 91, are each predicated upon a public market.

[44] Compare Gutiérrez and Sáez Lacave, n 29 above (arguing the need to protect minority investors in respect of a public company) with FH Easterbrook and DR Fischel, 'Close Companies and Agency Costs' (1986) 38 Stanford Law Review 271 (arguing that close company minorities protect themselves).

BrewDog's 2015 equity raise valued the company at over £300m – 116 times its annual profit.[45] This raise was successful.[46] BrewDog has three share classes: management hold 'A shares'm with "key members" of management together holding 52.07%.[47] An institutional investor holds a combination of A Shares and 'preferred C shares', giving them 23%.[48] This means that these key management and the institutional investor between them hold more than 75% of the nominal value of the shares of BrewDog.

BrewDog's offer relates to 'B shares', the same class that it has issued to the public previously, which have a nominal value of £0.001, at a price of £25.15 per share.[49] It has long been noted that nominal value is entirely disconnected from the market value of shares, and as such may be actively misleading in the case of equity raising such as this.[50] In this case, this means that the amount subscribed for in each share which is actually relevant for the calculation of entitlements is one 25,150th of the amount that the investor is paying. The equity raise is intended to raise £7.5m, but the directors can expand this to £50m in their sole discretion.[51] Were £50m to be raised, this would relate to 2.7% of the company's capital.[52] If all shares are valued equally, this values the company at just over £1.8 billion.

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[45] https://www.ft.com/content/adb4daa6-e9dd-11e4-a687-00144feab7de/.

[46] It issued 171,666 B shares (each with a nominal value of £0.001) at a price of £23.75 per share, raising over £4m, per a form SH01 return on allotment of shares filed with the Registrar of Companies on 16 July 2018 – available at https://find-and-update.company-information.service.gov.uk/company/SC311560/filing-history. Other similar returns imply that several tranches were issued as part of this fund raise. All information about the share capital of BrewDog is taken from the Prospectus and/or publicly filed information available up to 30 January 2020.

[47] BrewDog Prospectus, n 2 above, Securities Note 3.

[48] BrewDog Prospectus, n 2 above, Summary Document 3.

[49] BrewDog Prospectus, n 2 above, Securities Note 2.

[50] See J Armour, 'Legal Capital: An Outdated Concept?' (2006) 7 European Business Organization Law Review 5; E Ferran, 'Revisiting Legal capital' (2019) 20 European Business Organization Law Review 521; J Rickford, 'Reforming capital' (2004) 15 European Business Law Review 919.

[51] BrewDog Prospectus, n 2 above, Securities Note 2.

[52] BrewDog Prospectus, n 2 above, Securities Note 37.

The prospectus states that BrewDog's earnings before interest, tax, depreciation and amortisation in 2019 was £17m,[53] valuing the company at a multiple in excess of 100 times such EBITDA. The value of a company is, of course, based on future expectations in addition to current performance.[54] Where shares are publicly listed, this can be tested by reference to the market price.[55] BrewDog's shares are not publicly listed. Without such a public market, each investor has to establish the likelihood of their return exceeding their investment. This is generally estimated by the rough heuristic of multiplying some measure of profit by a multiple established by looking at comparable companies.[56] By way of comparators, in 2020, US breweries generally were valued between 10 and 35 times their EBITDA,[57]

[53] BrewDog Prospectus, n 2 above, Securities Note 11. The prospectus does not include a breakdown of this EBITDA, nor any calculation to justify it.

[54] This is a simple proposition with many subtle variants that are irrelevant for our purposes – for the importance of dividends see MJ Gordon, 'Dividends, Earnings and Stock Prices' (1959) 41 Review of Economics and Statistics 99; F Modigliani and MH Miller, 'Corporate Income Taxes and the Cost of Capital: A Correction' (1963) 53 American Economic Review 261. For the CAPM discussion, see WF Share, 'Capital Asset Prices: A Theory of Market Equilibrium under Conditions of Risk' (1964) 19 Journal of Finance 425; J Lintner, The Valuation of Risk Assets and the Selection of Risky Investments (1965) 47 Review of Economics and Statistics 13.

[55] At least, in a well-functioning capital market – WH Beaver, 'Market Efficiency' (1981) 56 The Accounting Review 23; LA Stout, 'The Mechanisms of Market Inefficiency: An Introduction to the New Finance' (2003) 28 Journal of Corporation Law 635.

[56] M Kim and JR Ritter, 'Valuing IPOs' (1999) 54 Journal of Financial Economics 409; LE DeAngelo, 'Equity Valuation and Corporate Control' (1990) 65 The Accounting Review 93. This is a very rough valuation tool – see S. Imam, R. Barker and C. Clubb, 'The Use of Valuation Models by UK Investment Analysts' (2011) 17 European Accounting Review 503. This is caused, at least in part, by the difficulty in identifying suitable comparators – see S Bhojraj and C Lee, 'Who is my peer? A valuation-based approach to the selection of comparable firms' (2002) 40 Journal of Accounting Research 407.

[57] https://www.mossadams.com/articles/2020/06/q2-2020-brewery-trends , with an average of 15.54 over 2019 according to research attributed to New York University - https://www.equidam.com/ebitda-multiples-trbc-industries/.

with it being thought that UK brewery multiples were generally at the bottom end of that range.[58] This is a legal article only, but it seems that there may be reasons to consider that BrewDog's self-valuation may be ambitious. Indeed, the company has issued options over 1,455,668 A shares (which would constitute c1.978%) with strike prices[59] at a range between £0.14 and £5.00 per share[60] – considerably lower than the £25.15 requested per B share on offer. Extrapolating from the most recent statement of share capital prior to the prospectus launch,[61] this would mean that, if the new offer were taken up entirely and all options exercised, then the total B shares, being all of those ever offered to the public, would represent approximately 20.29%, leaving A shares and C shares (those held by management, employees and the institutional shareholders) representing nearly 80%.

BrewDog's shares are not listed on a public exchange, restricting both retail investor exit and lowering the protective regulation in place. As B shareholders together will own less than 25% of voting rights, retail investors lack even negative control to block special resolutions.[62] BrewDog's prospectus is clear as to the limited rights obtained by shareholders – of its nine reasons for investing, six relate to enhanced purchasing rights of, or discounts in, BrewDog products,[63] one relates to a tree being planted in BrewDog's forest, and the final two are owning a part of BrewDog and receiving an invite to the AGM – described as being 'legendary' and offering '[a]wesome live music, epic beer tastings, thousands

[58] https://www.pwc.co.uk/industries/retail-consumer/insights/the-consumer-global-m-and-a-trends-in-the-consumer-sector/craft-beers-a-crowd-puller.html.

[59] See discussion in P Geiler and L Renneboog, 'Managerial Compensation: Agency Solution or Problem?' (2011) 11 Journal of Corporate Law Studies 99.

[60] BrewDog Prospectus, n 2 above, Registration Document 13. See discussion of share options in entrepreneurship in O Maynard and W Bains, 'Share Structure and Entrepreneurship in UK Biotechnology Companies: An Empirical Study' (2008) 8 Journal of Corporate Law Studies 1.

[61] Filed on 30 January 2020 - https://find-and-update.company-information.service.gov.uk/company/SC311560/filing-history?page=1.

[62] See discussion in V Joffe, 'Majority Rule Undermined?' (1977) 40 Modern Law Review 71.

[63] These rights increase the larger the shareholder's investment is.

of Equity Punks and the lowdown on all things BrewDog.'[64] Hardly the hallmarks of a traditional AGM.[65] Indeed, BrewDog's offer is hardly representative of the typical dry prospectus providing financial reasons for a rational investor to invest.[66] Offers to the public are usually assumed to be coupled with listings,[67] but there are challenges to this usual approach. Recently, Spotify listed its shares in New York, but through a 'direct listing' – the company submitting to capital markets rules but not issuing new shares. BrewDog's offer is the opposite of this – it offered shares to the public but without submitting to the capital market. Accordingly, not only are legal protections offered by capital markets law not available, the disciplinary effect of the market is also not available. Let us review the three key entitlements that are said to attach to shares in turn. Ostensibly the shares in the offer have *pari passu* rights with all other shares issued,[68] but the reality is more nuanced.

First, dividends. BrewDog pays a portion of its profits each year to its own charity.[69] This dedication to philanthropic giving is admirable,[70] but arguably stretches the corporate form: which in

[64] BrewDog Prospectus, n 2 above, Securities Note 25.

[65] See E Micheler, 'Facilitating investor engagement and stewardship' (2013) 14 European Business Organization Law Review 29.

[66] Prospectuses have, historically, been generally criticised for containing too much financial information – H Kripke, 'The SEC, the accountants, some myths and some realities' (1970) *New York University Law Review* 1151 – making them incomprehensible to laymen – H Kripke, 'The Myth of the Informed Layman' (1973) 28 *The Business Lawyer* 631.

[67] Gullifer and Payne, n 13 above, ch 10.3.3.

[68] BrewDog's articles of association, filed on 10 November 2020, available at https://find-and-update.company-information.service.gov.uk/company/SC311560/filing-history. Article 6.1.

[69] BrewDog Prospectus, n 2 above, Securities Note 3.

[70] See B Sjåfjell 'Beyond Climate Risk: Integrating Sustainability into the Duties of the Corporate Board' (2018) 23 Deakin Law Review 41; A.L. Christie, 'The new hedge fund activism: Activist directors and the market for corporate quasi-control' (2019) 19 Journal of Corporate Law Studies 1.

the US has required interests of shareholders to be considered first[71] and in the UK requires directors to consider the interests of the shareholders as paramount, despite rhetoric that hints at the contrary.[72] BrewDog also pays 10% of profits as an annual bonus to staff without any mention of their individual performances.[73] In the financial year ending 31 December 2019, the board of directors received £1m total remuneration,[74] the same as the entire net profit of the company for that year.[75] Therefore, its profit is mostly paid to charitable foundations and to staff and management. Its policy is not to pay dividends to shareholders.[76] As noted above, if this offer to the public were coupled with a listing on a capital market, the capital market would likely apply pressure for a dividend.

Second, return on capital. On a winding up or any public listing, C shareholders are paid first, receiving the price of their investment plus a compounding 18% per annum.[77] This would mean that the holders of C shares would receive in excess of the first £400m on any exit.[78] Funds are then to be

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[71] JR Macey, 'A Close Read of an Excellent Commentary on Dodge v Ford' (2008) 3 Virginia Law and Business Review 177.

[72] Companies Act 2006, s172, as discussed in A. Keay, 'Tackling the issue of the corporate objective: an analysis of the United Kingdom's 'enlightened shareholder value approach" (2007) 29 Sydney Law Review 577; A Keay and T Iqbal, 'The Impact of Enlightened Shareholder Value' [2019] Journal of Business Law 304. The UK has a history of requiring directors to consider the interests of shareholders – see *Parke v Daily News Ltd* [1962] Ch. 927, as discussed in L Sealy, 'Perception and Policy in Company Law Reform' in D. Feldman and F. Meisel (eds) *Corporate and Commercial Law: Modern Developments* (Lloyd's of London Press, 1996), 27.

[73] BrewDog Prospectus, n 2 above, Securities Note, 3.

[74] BrewDog Prospectus, n 2 above, Registration Document 12.

[75] BrewDog Prospectus, n 2 above, Registration Document 24.

[76] BrewDog Prospectus, n 2 above, Securities Note 3.

[77] BrewDog's articles of association, n 68 above, article 6.2.

[78] This is based on a few assumptions. 8,383,915 existing shares were redesignated as C shares on 29 March 2017 (see form SH08 filed on 26 June 2017 - https://find-and-update.company-information.service.gov.uk/company/SC311560/filing-history) and a statement of capital filed on 7 June 2017 states 7,776,934 C shares were issued on 6 April 2017 at a price of £13.18 per C share (https://find-and-update.company-

split *pari passu* between A and B shareholders.[79] Directors retain the discretion to refuse any transfer by a B shareholder.[80] This is usual in private companies,[81] and can trace its lineage directly to the Bubble Act of 1720.[82] Accordingly, exit is not guaranteed. BrewDog open their own online platform periodically for B shareholders to trade through – such platform charges 3 per cent of the transaction price to each of the purchaser and the seller.[83] BrewDog is a plc and therefore subject to the Takeover Code,[84] and as such should a party acquire over 30 per cent of the shares in the capital of BrewDog then there will need to be a mandatory bid for all shares.[85] This may result in the B shareholders having

information.service.gov.uk/company/SC311560/filing-history). Public filings do not make it clear when the redesignated shares were issued or for what price. However, if we assume that all C shares reflected in the 30 Janaury 2020 statement of capital were issued at a price of £13.18 per share on 6 April 2017, then the total price of the C share investment is over £200m, plus cumulative interest at 18 per cent per annum - if that assumption was correct and an exit takes place on 6 April 2021, then the C shareholder will receive the first £412,959,643 of any shareholder equity. If this takes place on 7 April 2022 then the C shareholders will receive the first c£487m, and if it takes place on 7 April 2023, then the C shareholders will receive £575m. As BrewDog states that it believes in independence from 'multi-national conglomerates controlled by faceless accountants and balance sheets' - https://www.brewdog.com/uk/community/brewdog-believe - it seems unlikely that any exit is planned in the short term.

[79] BrewDog's articles of association, n 68 above, article 6.2.2. As there were already 57,063,176 A and B shares in issue prior to the new issue (see form SH01 filed on 30 January 2020 - https://find-and-update.company-information.service.gov.uk/company/SC311560/filing-history) if the new share issue is taken in full then the total number of A and B shares in issue will be 59,051,247. For these to be paid at the price currently being paid for, the exit needs to take place at £1.8bn.

[80] BrewDog's articles of association, n 68 above, article 37.1.

[81] J Hardman, 'Articles of Association in UK Private Companies: An Empirical Leximetric Study' (forthcoming 2021) European Business Organization Law Review.

[82] See R Harris, *Industrialising English Law – Entrepreneurship and Business Organization 1720-1844* (CUP, 200) 289.

[83] BrewDog Prospectus, n 2 above, Securities Note 37.

[84] N 11 above.

[85] This is also reflected in the articles BrewDog articles of association, n 68 above, article 41.

an ability to exit, but it will not be in their control. As such, in addition to having a large payment due before they obtain any entitlement, B shareholders cannot be said to have any ability to sell their shares. If this offer to the public were coupled with a listing, they would be able to know the market value of their investment at any time, and be able to freely sell their shares on such market.

Third, voting. All BrewDog shares have equal entitlements as to voting.[86] However, two important limitations apply. First, the A shares and C shares will hold, between them, over 75% of votes. They can therefore pass any resolutions that they like. They cannot remove any rights from the B shareholders, but they can interfere with the enjoyment of those rights[87] - for example by issuing more shares. Second, all powers of the company sit with the board.[88] This includes an unlimited borrowing power[89] - whereas normally there are limitations on such borrowing powers for publicly traded companies[90] which provides further protections to shareholders that directors will not unilaterally increase debt of the company. This is lacking in the BrewDog offer – directors can do what they would like, and in any matter that requires shareholder decisions, management and the institutional investor can make them.

Accordingly, subscribing for BrewDog's Equity for Punks Tomorrow scheme will provide you with no income, no control to direct the exit of your investment, and without a meaningful voice. The latter is, of course, a usual consequence of obtaining a minority stake in any company.[91] However,

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[86] BrewDog's articles of association, n 68 above, article 6.

[87] *White v Bristol Aeroplane* [1953] 2 WLR 144.

[88] BrewDog's articles of association, n 68 above, article 89.

[89] BrewDog's articles of association, n 68 above, article 95.

[90] Most institutional shareholder bodies state that public companies should have limits on their borrowing – such as the Association of British Insurers (https://www.ivis.co.uk/media/5881/Articles-of-Association.pdf, 1); the Pensions and Lifetime Savings Association (https://www.plsa.co.uk/Portals/0/Documents/Policy-Documents/2020/PLSA-Stewardship-Guide-and-Voting-Guidelines-180220.pdf, 26).

[91] RJ Gilson, 'Controlling shareholders and corporate governance: Complicating the comparative taxonomy' (2005) 119 Harvard Law Review 1641.

protections would exist for investors in BrewDog if it were publicly listed: there would be governance requirements as to how corporate decisions were made,[92] requirements that dominant shareholders enter into agreements to limit their influence.[93] In addition, if the shares were listed on the main market of the UK's public exchange, then at least 25% of equity shares would be listed,[94] and each equity share would be linked to a corresponding voting right.[95] This means those shares listed on the capital market would, collectively, enjoy the negative power to block special resolutions. Investors would also be able to exit on the market freely, and market prices would dictate the price of future offer levels. Given that B shareholders cannot freely exit BrewDog, it seems surprising that law provides potential investors with fewer legal protections than it would were a public market involved - when it appears that potential BrewDog customers would require even more. Existing theoretical approaches either proceed on the basis that potential shareholders are insiders, able to exert some form of power over the (normally close) company, or purely external shareholders who can exit if the company is being run a way contrary to their interests. Protections are provided accordingly.[96] BrewDog shows us that there is a middle ground, grey area – and shareholders in this grey area have fewer legal or market protections than shareholders in the archetypal publicly listed company, but arguably need them more.

## 4. Branding?

[92] Afforded by the UK Corporate Governance Code, n 40 above.

[93] Listing Rules, Rule 6.5.4. See discussion in PL Davies, 'Related Party Transactions: the UK Model' in L Enriques and TH Tröger (eds) *The Law and Finance of Related Party Transactions* (Cambridge University Press, 2019), 395-398; A Engert and T Florstedt, 'Which related party transactions should be subject to ex ante review? Evidence from Germany' (2020) 20 Journal of Corporate Law Studies 263.

[94] Listing Rules, rule 6.14.2.

[95] Listing Rules, rule 7.2.1A.

[96] Very few protections are afforded to potential investors in private companies when compared to the obligations to disclose information for an offer to the public and the listing rules.

BrewDog's share offer is clearly strongly linked to its branding – implicit in the name of the offer,[97] throughout its prospectus[98] and even throughout its articles, which in addition to the general power of directors to refuse to transfer shares contains a superfluous proclamation that the board may refuse to register the transfer of a share to any "monolithic purveyor of bland industrial beer".[99] The use of branding in corporate transactions has been noted before. Fleischer noted that a series of US companies made ostensibly illogical choices due to branding implications – Google's 2004 public offering was done by way of internet auction rather than more traditional means, Ben & Jerry's only sold its shares to Vermont residents when it went public in 1984, Steve Jobs' contract with Apple only gave him an annual salary of $1, and Stanley Works decided against the financially sensible decision to reincorporate in Bermuda, and instead stayed in Connecticut where its taxes were higher – in each case because it made sense for the company to maximise its branding impact.[100] However, the public ultimately received uniform instruments for each of these companies - a typical share offered to the public on a listed exchange with the stereotypical entitlement attaching to a share. Each of these companies made a decision to increase branding to ultimately maximise value to shareholders. BrewDog's offering instead pushes the boundaries of a publicly owned share by removing the majority of financial rights. The majority of benefits that BrewDog states it offers relate to, ultimately, discounts for the purchase of BrewDog products.[101] It is therefore offering an entirely unknown (and uncontrollable) return combined with a loyalty card. Under the UK regime, this offer needs less regulation than a usual offer of shares to the public which is coupled with a listing of shares on LSE. Perhaps we need to rethink whether this is the correct balance for our legal system to deploy. Nothing in this article is intended as a critique of BrewDog – they have offered a popular product for purchase entirely within the legal

[97] BrewDog's first and headline beer was "Punk IPA" - https://www.brewdog.com/uk/punk-ipa-4-x-can, which links strongly to the "Equity for Punks" branding.

[98] See reference to the annual general meeting, noted above n 64.

[99] BrewDog's articles of association, above n 68, article 37.2.

[100] V Fleischer, 'Brand New Deal: The Branding Effect of Corporate Deal Structures' (2006) 104 Michigan Law Review 1584.

[101] See above n 63.

framework available to them. However, their ability to do so asks bigger questions of company law. Of course, it is possible that potential investors know full well the risks in making such an investment in BrewDog, and are convinced to do so by the branding and the discounts available to them. Legal protections for investors cannot, and should not, protect them from bad investment decisions.[102]

## 5. Conclusion

There are many reasons that individuals could want to be linked to BrewDog. Their branding, messaging, and philanthropic investments are highly attractive. The author particularly enjoys the product made by BrewDog. If investors want to subscribe for "Equity for Punks Tomorrow" for these intangible, non-financial reasons, or even merely for the discount on BrewDog products, then they should be able to do so.

But does law provide sufficient protection for those retail investors who are hoping that BrewDog shares will provide a greater financial return on their investment? Perhaps law needs to provide more protections for public offerings which are not coupled with the heightened legal and disciplinary effects of a capital market. At the moment, this category receive fewer protections, when their need seems higher. For whilst an informed individual subscribing for "Equity for Punks Tomorrow" should be facilitated in doing so, it will feel as if law has failed if an uninformed retail investor feels like a punk tomorrow for subscribing for this equity.

[102] Financial Services and Markets Act 2000, s 1C(2)(d).